SHARIA AND CONSTITUTION: LEARNING FROM SURYANI'S FAILURE TO INCREASE ISLAMIC COURT JURISDICTION

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Abstract: Although Islamic law has long been practiced in Indonesia, for some Muslims it has not yet been completed, because what is related to penalties in criminal law has not been accommodated in Indonesia criminal law system. Efforts to legalize penalties contained in Islamic criminal law carried out by Suryani, through his request to the Constitutional Court. Suryani demanded the Constitutional Court to accept his petition to increase the jurisdiction of the Islamic Courts, so as to has the authority to examine cases related to Islamic criminal law. Suryani request was rejected by the Constitutional Court. This study aims to see the context of the Suryani petition, his arguments, the arguments put forward by the Constitutional Court, and the lessons that can be taken from this incident. By assuming that the transformation of Islamic law into national law can be carried out in three ways, namely substantive, normative and symbolic the author argues that the refusal of the Suryani petition does not mean that Indonesian Muslims cannot carry out Islamic teachings perfectly (*kaffah*) .

Keywords: Constitution, Indonesia, Islamism , Sharia

Introduction

Although Islamic law has long been practiced in Indonesia, for some Muslims it has not yet been completed, because what is related to criminal law, especially sanctions such as *rajam* (stoning to death) and cutting off hands have not been accommodated in the criminal law system in Indonesia. Efforts to legalize this and other penalties contained in *Fiqh Jinayah*, were then carried out by Suryani, a resident of Banten Province, through his request to the Constitutional Court.

Suryani demanded the Constitutional Court to accept his petition to increase the jurisdiction of the Islamic Court, so that it has the authority to examine and decide cases related to Islamic criminal law. Although Suryani request was rejected by the Constitutional Court, the aspirations of Muslims in Indonesia to make Islamic law as a material source for law making were quite high. The problem that arises is how to accommodate the aspirations of Muslims who want Islamic law as national law.

In the face of these demands, the government actually faces a dilemma. If this aspiration is accommodated, it will give birth to a number of discriminatory rules that are contrary to the purpose of the state to realize social justice for all Indonesian people. If this aspiration is not accommodated, then the government will continue to get political pressure from politicians who make Islam as a political ideology and make Islamic law as its agenda or Islamism. [1].

Therefore, studies to find ways to make Islamic law absorbable in national law without disturbing or violating national system become important. Why was the judicial review submitted by Suryani rejected by the Constitutional Court? What is the social and political context behind Suryani's request for increasing jurisdiction of Islamic court? What is the argument presented in the court? What

is the implication and lessons can be taken from this event? This study aims to analyze (1) the context of Suryani requests, (2) the arguments presented in the court (3) implication and lessons that can be taken from this case.

Method

This research is a kind of normative research which commonly used in reviewing legal issues. In normative research, the aspects examined include legal principles, legal systems, synchronization of laws both vertical and horizontal, comparative law and legal history [2]. This research can also be categorized as non-doctrinal qualitative legal research which covered some problems, policy and law reform based research [3]. Data sources are taken from documents and a number of library materials

Primary data is taken from the decision document of the Constitutional Court Number 19/PUU-VI/ 2008 which was read on August 8, 2008. Supporting data is taken from reading material or literature that describes theories and social political situation at that time. Data will be classified and analyzed to explain the background of Suryani's request, the arguments presented by parties involved in this court. The impact of this refusal and the lesson that can be taken.

Results

The Suryani case actually does not stand alone. What is asked by Suryani was not merely legal matters but also related to politics or ideology of Islamism. After the downfall of New Order authoritarian regime, the effort to Islamize national law is rising. By referring to the rights that are guaranteed by the constitution of Indonesia, Suryani argues that civil or personal law has already be carried out in Indonesia, but Islamic teachings related to crime (*jinayah*), especially those related to criminal penalties cannot yet be implemented in Indonesia because of the limitation of religious court jurisdiction. The difficulties to implement Islamic teachings related to *jinayah*, such as stoning for adultery and cutting off hands for thieves, had made Muslims in Indonesia, constitutionally disadvantaged. Because, it means that Muslims in Indonesia cannot carry out their religious teachings perfectly (*kaffah*). In addition, carrying out religious teachings is also a part of worship that is guaranteed and protected by the constitution.

In rejecting the demaind of Suryani, the Constitutional Court argues that between argument used as the basis of a claim (*posita*) and any claim requested by the plaintiff (*petitum*) is not meet.In addition, the Constitutional Court is basically a negative legislator not positive legislator. It means that constitutional court is just able to erase rather than to add the norms. According to Constitutional Court, what is demanded by Suryani is not in line with the concept of the relationship between religion and the state adopted by Indonesia. In addition, Islamic law is not the only source of national law in Indonesia. In sum, article 49 paragraph (1) that was tested by Suryani did not conflict with articles contained in the constitution.

The lessons that can be taken from the Constitutional Court's ruling is that the sharia for Muslims should be treated as paradigm whose implementation is not single. There is also a need to reconstruct sharia. The reconstruction of sharia can be initiated from the way Muslims explore the values and norms of the sharia, the way they practice the sharia and the way they transform the sharia in national law. What is the most important is the need for Muslims to change their mindset by seeing differences in understanding the sharia as grace, so Muslims have many choices in practicing sharia.

Discussion

A . The Context of Suryani's Request

The Constitutional Court is a new state institution born after the reform era. The main task of this institution, among others, is to examine the constitutionality of the law to ensure that the constitutional rights which are the basic rights of citizens are still protected, not violated or revoked by a law. The presence of the Constitutional Court can complement the democratic process that took place in Indonesia through a check and balances mechanism. Therefore, although a law has been ratified by the DPR as a legislative body, if there is an element or article that contradicts the principles

contained in the constitution, the law or part of it can be canceled by the Constitutional Court. As a judiciary whose main task is to guard the constitution, this court also functions as the guardian of the state ideology, Pancasila, so that Pancasila as an ideology of the state is maintained from the possibility of attempts to undermine or replace it.

In its history, the acceptance of Pancasila as the ideology of the state did not go smoothly. Fierce debate took place, before all components of the nation eventually able to accept Pancasila as the final ideology for Indonesia. Faisal Ismail in his dissertation entitles *Islam, Politics and Ideology in Indonesia: A Study of the Process of Muslim Acceptance of the Pancasila*, explained how the process of Muslims in accepting it. Pancasila that its mean is five principles were used by Empu Prapanca in his book *Negarakertagama* and Empu Tantular in his book *Sutasoma.* These two writers are great thinkers who lived under Hindu Kingdom of Majapahit. So it is not easy for Muslims who adher Islamism to accept it as the state ideology [5].

Although expert such as Bassam Tibi in his book, *Islam between Culture and Politics* said that Islam is both a religious faith and a cultural system, but not a political ideology [6], however, Islamic movements that carry Islamic ideology cannot be entirely suppressed in Indonesia. In his book *Islam and Islamism,* Tibi explained the differences between Islamism and Islam by saying that Islamism is about political order, not faith. Nonetheless, Islamism is not mere politics but religionized politics. It is a political ideology that is distinct from the teaching of the religion of Islam [7].

In explaining the role of religion in politics, Masykuri Abdillah classified into three forms. Firstly, religion as a political ideology; secondly, religion as ethical, moral and spiritual base and third, religion as sub-ideology. Countries that place religion as ideology tend to practice religious teachings formally as positive law and take a structural approach to socialization and institutionalization of religious teachings. Countries that place religion as an ethical, moral, and spiritual source tend to support cultural approaches and reject structural approaches in terms of socialization and institutionalization of religious teachings. This means that the implementation of religious teachings should not be institutionalized through legislation and state support, but enough with the consciousness of religious people themselves. Countries that place religion as sub-ideology tend to support a cultural as well as structural approach by involving religious teachings in public policy making in a constitutional, democratic and non-discriminatory manner [8].

In Indonesia, the Islamic political movement (Islamism) has also existed since before independence, during Dutch colonial period. However, the government suppressed ideas and activities among Muslims that could threaten Dutch control over the Indonesian Archipelago. The policy set aside some of the religious law that had come into limited use in several courts of law during the Dutch colonial period, on grounds that administration of justice should rest on the mores and customs of the various areas. Accordingly, Dutch officials recognized only a thin area of family life—marriage, divorce, reconciliation—as constituting Muslim law and only for those Indonesians who specifically requested it [9].

This policy is based on the study by the Dutch scholars G.A. Wilken, C. Van Vollenhoven and C. Snouck Hurgronje on the role of religion and custom in the lives of Indonesians. The result of study is the adoption of an official policy designed to encourage some aspects of religious activity, but giving custom clear precedence over religion. Social and educational activities were encouraged, since they were considered to increase standard religious belief and lessen the chances of adopting fanatical religious beliefs inimical to Dutch rule. The results of the studies are known as *receptie* theory. According to the *receptie* theory, Islamic law in Indonesia only applies if customary law requires it [10]. This theory became the reference of colonial policy since 1929 through the *Indische Staatsregeling* of 1929 Article 134 paragraph 2. [11].

After Indonesian independence, the *receptie* theory used by Islamic Courts was opposed by a number of Indonesian legal experts on the ground that all laws of Dutch East Indies government based on *receptie* theory cannot be applied again, because its soul is contradictory to the 1945 constitution. Article 29 verse 1 of the 1945 constitution said that the state shall be based upon the belief in the One and only God. Based on this article, the Republic of Indonesia is obliged to form an Indonesian national law with the material derived from religious law. It is the obligation of state to do it. The

religious law that would be Indonesia law is not just Islamic law, but also other religious law living in Indonesia. Religious law in civil and criminal law that was absorbed into Indonesian national law, then becoming a new Indonesian law based on *Pancasila* (state ideology). This theory was developed by Hazairin in his book *Tujuh Serangkai tentang Hukum (The Seven Laws)* [12]. This theory is well know by *receptie exit* theory.

Another theory, *receptie a contrario*, introduced by Sayuti Thalib. This theory said that for Muslims, Islamic law should be applied to them, customary law can be applied if not contrary to Islamic law. Another theory, the *positivization* of Islamic law that was supported by A Qadri Azizi said that Islamic law basically has become a positive law for Indonesian Muslims. Therefore, the application of Islamic law no longer determined on acceptance of customary law. The main reference of this theory is Law No 1/1974 on marriage. Article 2 (1) of this law said that marriage is valid, if it is done according to the law of each religion and belief [13].

So, although the judicial review submitted by Suryani in the Constitutional Court is a legal case, the struggle to get wider jurisdiction of religious court, this incident cannot be separated from political situation in the form of the rise of Islamism. Although Islamism groups not succeeded in making Islam as the state's ideology, replacing Pancasila, they continue to struggle to make Islam a sub-ideology by continuing to fight for the implementation of Islamic sharia for Indonesian Muslims through structural and cultural approaches. What Suryani is doing is a form of structural struggle so that Islamic law, especially those contained in classical *fiqh jinayah* can be applied to Muslims through Islamic courts.

About seven years before Suryani submitted a judicial review to the Constitutional Court, the practice of the *jinayat* law related to adultery took place in Ambon. *Kompas* daily on Thursday, May 17, 2001, reported a news entitles: "*Rajam* punishment in Ambon is sharia enforcement: Ja'far Umar Thalib". It is said that *Laskar Jihad Ahlus Sunnah wal Jamaah* (ASWJ) has imposed *rajam* penalty against its member in the late of March, 2001. It is said that the implementation of *rajam* is a continuation of sharia imposition in Ambon that has been declared by Ambon Muslim community since January 4, 2001. "After January 4 declaration that read before Muslims in the front of *Al-Fatah* grand mosque in Ambon, Muslim community through their Jihad task forces initiated to conduct and ect." Ja'far said. According to Ja'far, in the mid of heated campaign and movement by Muslims to eradicate the vices, there is adultery incident or precisely a rape. This raping conducted by a member of *Laskar Jihad* ASWJ against female maid, 13 years old, in Diponegoro village. "After being captured, the perpetrator then be interrogated and confessed what he was done thereby asking to be processed by Islamic law." Ja'far said. As commander of Laskar ASWJ, Ja'far initially has persuaded him, so he could be avoided from *rajam* punishment, of course, through mechanism available in sharia. But the boldness attitude of perpetrator make his effort has no avail. Considering the status of perpetrator has been married, in sharia law, the adulterer like this should be stoned to death. Ja'far sees, in sharia law there is a norm, if somebody suspected of committing adultery, it should be proved by one of two ways. The first is by confession of the perpetrators themselves. But this confession can be canceled if they retract it. Secondly, if they are captured in hand by four witnesses who directly see the act of perpetrators. "If the four witnesses have been sworn and they are considered trustworthy enough by sharia court, there is no need of confessions from perpetrators. And the law can be enforced," Ja'far said. Since the enforcement of *rajam* punishment is awkward viewed from the Indonesian system of law, Ja'far eventually prosecuted and facing trial in Bogor district court because of the execution of stoning without the authority from the legal system in this country [14].

At that time, in the western part of Indonesia, the province of Aceh, which received special autonomy to implement Islamic law as a whole, was also preparing for the implementation of Islamic law in its entirety, including its criminal aspects. Approximately, nine years after the execution of *rajam* in Ambon, or about one year after Constitutional Court refused Suryani request, or precisely on September 14, 2009, Regional Council of Aceh (DPRA) passed a *qanun* (bylaw) that possibility allow adulterer to be punished by *rajam* (stoning to death). Article 24 verse (1) of the draft of this *qanun* imposed 100 lashes for adultery committed by person who not bound in marriage and *rajam* for adulterer bound in marriage.

Although for some of Acehnese, this *qanun* is has long been awaited, this *qanun* is problematic for the Acehnese themselves. It is refused by both government as well as some of people of Aceh. The imposition of this *qanun* was colored by the waves of protest by both proponents and opponents of this bill. “We are firm in defending that *rajam* punishment cannot be included in *qanun*,” vice governor Muhammad Nazar said. According to Nazar, the *qanun* that has been legitimized by DPRA still able to be reviewed by ad hoc team made by legislature and government of Aceh such as mandated by consensus of *Panmus* (Deliberating Committee). “It is right that all regulations that have been approved by legislature should be implemented by government. But our stance is firm in refusing this *qanun*, let alone this is imposed with some notes.” Nazar added. Activists of civil society also demanded legislature to rewrite this *qanun jinayat* to be adjusted by universal values of Islam and human rights, as well as to ensure its harmony with other regulations. They also demanded the involvement of ulema, intellectuals from university, law enforcers, legal practitioners as well as civil society including female groups. On the other side, Muhariadi, politician from PKS (Prosperous Justice Party) said that points that have been approved in *qanun jinayat* cannot be disturbed again. “If there is a review it should be limited only on language editing” he said [15].

After going through lengthy negotiations, in 2014, Aceh *Qanun* No. 6 / 2014 of Jinayat Law came out. In this *qanun*, stoning is no longer included. Article 33 of this *qanun* says: "Anyone who deliberately commits *jarimah* (evil) adultery is threatened with *uqubat hudud* (definitive punishment) whipping 100 (one hundred) times."

B. The Argument Presented in the Court

In filing a judicial review, Suryani refers to a number of articles in the constitution as a reference. The articles stated that: "Everyone is free to embrace religion and worship according to his or her religion," (Article 28E paragraph 1), "Religious rights are human rights that cannot be reduced under any circumstances", (Article 28I paragraph 1)," Everyone has the right to be free from discriminatory treatment on any basis and has the right to protection from such discriminatory treatment "(Article 28I paragraph 2)," State based on God Almighty "(Article 29 paragraph 1) and" the state guarantees the independence of each of resident to embrace his or her religion and to worship according to his or her religion and belief "(Article 29 paragraph 2).

The article that was reviewed by Suryani is article 49 paragraph (1) of Law No.7 / 1989 which was amended by Act No.3 / 2006. This article states: "The Religious Court has the duty and authority to examine, decide, and settle cases at the first level between people those who are Muslims in the fields of: a) Marriage b) Inheritance c) Grant d) Endowments e) *Zakat* f) *Infaq* g) *Sadaqah*; and h) Islamic economics. This article was tested not because Suryani wanted this article to be abolished but because this article was considered still lacking in fulfilling the demands of his constitutional rights guaranteed and protected in a number of articles in the constitution.

As a Muslim, he actually wants to worship and carry out Islamic teachings perfectly (*kaffah*). According to him, perfect Islamic teachings not only contain faith (*aqidah*) and worship but also include civil and criminal law (*jinayah*). Islamic teachings relating to faith, worship and civil or personal law has already be carried out in Indonesia. But Islamic teachings related to crime (*jinayah*), especially those related to criminal penalties cannot yet be implemented in Indonesia. The absence of implementation of Islamic teachings relating to *jinayah*, such as stoning for adultery and cutting off hands for thieves, has made Muslims in Indonesia, including himself, constitutionally disadvantaged. Because, it means that Muslims in Indonesia cannot carry out their religious teachings perfectly (*kaffah*). In fact, carrying out religious teachings perfectly for Muslims is a demand from their religious teachings. It is also a part of worship that is guaranteed and protected by the constitution.

If the state limits or prohibits Muslims from implementing Islamic law as a whole (*kaffah*), it is the same as the state restricting or prohibiting Muslims from worshiping and obeying their religious teachings. Article 29 paragraph 1 of the 1945 constitution which reads: The State based on the One God Almighty has the meaning that the Republic of Indonesia is a religious country so that its people must not be prevented from perfecting their faith and piety to God Almighty. *Takwa* according to him

is carrying out the commands of Allah SWT and away from all His prohibitions. So, those who are devoted are people who always do the whole command of Allah SWT and always stay away from all His prohibitions, without exception. To strengthen his argument, he quoted the Qur'anic verse contained in Sura al-Maidah verse 38 which means: "Men who steal and women who steal, cut off their hands (as) in return for what they do and as a torment from Allah, and Allah is Mighty, Wise." If Muslims enforce themselves Islamic law, especially those related to *jinayah*, without any legality from the State, it will be considered to uphold the law above the law. According to the legal rules that are still valid in Indonesia to date, this will be considered a violation of the law.

Therefore, through the proposed judicial review, he requested that the Constitutional Court added the authority possessed by the Religious Courts (Islamic Court) so that it could examine and decide cases relating to Islamic crimes.

The argument submitted by the Constitutional Court in its refusal can be summed up to five. First, between *posita* (the argument that describes the relationship that is the basis of a claim) and the *petitum* (any claim requested by the plaintiff to the judge to be granted) is inappropriate. Second, adding the norm or article in the law is not the duty of the Constitutional Court because the Constitutional Court is basically a negative legislator rather than a positive legislator. Third, what is demanded by Suryani is not in accordance with the understanding of the relationship between religion and the State in Indonesia. Even though Indonesia is a country based on the One God Almighty, which protects every adherent of religion to carry out their respective religious teachings, Indonesia is not a religious state based only on one particular religion. Indonesia is also not a secular country that does not pay attention to religion at all and submits religious affairs entirely to individuals and society. Fourth, Islamic law is indeed a source of national law, but Islamic law is not the only source of national law, because in addition to Islamic law, customary law, and western law, and other legal traditions also become a source of national law. Islamic law can be a material source as a material for formal legislation. Islamic law as a source of law can be used together with other legal sources, so that it becomes the material for the formation of laws and regulations that apply as national law. In relation to the basis of the Pancasila philosophy, national law must guarantee the unity of ideology and integration of the state's territory, and build religious tolerance that is just and fair. Thus, national law can be an integration factor which is an adhesive and unifying tool of the nation.

Fifth, in accordance with the provisions of the constitution, the Religious Courts are one of four judicial environments that have the authority to uphold law and justice, whose scope and limits of competence are determined by law. Therefore, the regulation of Article 49 paragraph (1) of the Religious Courts Law is in no way contrary to the 1945 Constitution. Article 49 paragraph (1) of the Religious Courts Law does not contradict Article 28E paragraph (1), Article 28I paragraph (1) and (2), as well as Article 29 paragraph (1) and (2) of the 1945 Constitution.

C. The Implication and Lesson that Can be Taken from Constitutional Court Refusal

Considering the Constitutional Court's decision is final, it is binding to the applicant, he cannot appeal. (Article 24C of the 1945 Constitution). However, there are some lessons that can be learned from this decision. First, given the constitution of 1945 has been tested and proven not contrary to the principles of Islamic teachings, then for Muslims, obedience to the constitution is essentially the same as adherence to the teachings of Islam. So, there is no reason for Indonesian Muslims to refuse the constitution as well as the decision of constitutional court.

Second, Muslims should make the sharia a paradigm. It means that as an ideal concept that comes from God, the substances of the sharia are justice, benefit, wisdom and compassion. However, when it is understood and interpreted by humans, it varies according to the variety of methodologies used and in accordance with the context of space and time that influence it. Therefore, in history there are some types of sharia, namely: classical sharia, historical sharia, contemporary sharia, all of which have pluralistic faces. Therefore, sharia which is practiced in the constitutional system of Indonesia does not same as the sharia practiced in other countries. The plurality in implementing sharia must be respected and tolerated insofar as it does not go beyond the objectives of the sharia.

Third, the need for sharia reconstruction so that it can answer contemporary problems and challenges. Reconstruction of Shari'a can be started from the way the sharia norms are explored, how the Sharia is practiced, and the way the sharia is transformed in the national legal system. Fourth, that Muslims must dare to change their mind set by making differences in understanding and practicing the sharia as grace. Because then, Muslims have many choices in implementing the sharia without violating the laws of the State.

Conclusion

The judicial review submitted by Suryani cannot be separated from the emergence of Islamism groups which have the agenda of implementing sharia structurally through state instruments. Islamism which was suppressed by the New Order's authoritarian regime, surfaced again after the regime collapsed and Indonesia entered an era of democracy. At least there were three arguments raised by Suryani to support its demands. The three arguments are (1) the constitution guarantees religious people to worship and practice religious teachings (2) the Law on Religious Courts in particular article 49 paragraph 1, prevents Muslims from practicing criminal law, because of the limited authority of the Religious Courts (3) Restrictions on the authority of the Religious Courts are the same with the state preventing Muslims from practicing their religious teachings perfectly (*kaffah*).

There are five arguments used by the Constitutional Court to reject them. First, between posita and petitum is not suitable. Second, the Constitutional Court is basically a negative legislator. Third, what is demanded by Suryani is not in line with the concept of the relationship between religion and the state adopted by Indonesia. Fourth, that in Indonesia, Islamic law is not the only source of national law. Fifth, article 49 paragraph (1) that was tested by Suryani did not conflict with a number of articles contained in the constitution.

There are at least four lessons taken from the Constitutional Court's ruling. First, considering the constitution is the agreement of the founders of the nation whose substance is in line with the teachings of Islam, rejecting the constitution is the same as rejecting the contribution of the founders of the nation. Second, the sharia for Muslims is a paradigm whose implementation is not single. Third, the reconstruction of sharia can be started from the way Muslims explore the values and norms of the sharia, the way they practice the sharia and the way they transform the sharia in national law. Fourth, the need for Muslims to change their mind set by seeing differences in understanding the sharia as grace.

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